Supreme Court, U.S.
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No. 09-1011

In The

Supreme Court of the United States

MICHELE FEINBERG TRULL,

Petitioner,

vs.

MICHAEL B. FEINBERG,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does a state court order confirming the validity of a testamentary appointment of trust principal violate the Equal Protection or Establishment Clauses of the Constitution of the United States when that appointment excludes potential beneficiaries who had or were married outside a specific religious faith as of the date of the appointor's death?

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STATEMENT OF THE CASE

Petitioner substantially misrepresents Max Feinberg's viewpoints and intentions, the practical operation of the Religious Preference Clause (called the "beneficiary restriction clause" by the Illinois Supreme Court), the procedural history and the opinion of the Illinois Supreme Court.

A. Max Feinberg's Intent

Max Feinberg ("Max"), a man of conservative religious leanings, intended the Religious Preference Clause to "promot[e] through his own family the preservation of the Jewish culture and faith that he both treasured and feared was at risk." (App. 16, 65).[1] Traditional Jewish religious law prohibits intermarriage and treats it as an abandonment of the faith. 2 J. David Bleich, *The Prohibition against Intermarriage*, *in* CONTEMPORARY HALAKHIC PROBLEMS 268 (Ktav Publishing House 1983) (discussing Scriptural sources of prohibition). During his life, Max observed statistics showing that over fifty *per cent* of American Jews married members of other faiths and expressed concern regarding the threat such intermarriage posed to the Jewish faith. (App. 16). Accordingly, Max employed the Religious Preference Clause

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[1] References are as follows: Petition, "(Pet., p. ___)"; Appendix to Petition, "(App. ___)."; Petitioner's Brief before the Illinois Supreme Court, "(Pet'r's Ill. Sup Ct Br., p ___)"; the Record on Appeal, "(C___)."

to provide a benefit to those descendants of his children who opted to honor and further his commitment to the Jewish faith by marrying within that faith or by remaining unmarried and, thereby, remaining Jewish under traditional Jewish religious law. There is nothing whatsoever in the record to support Petitioner's wild accusation that "the Religious Preference Clause at issue here is rooted in religious bigotry" nor is there any evidence regarding Max's views on gentiles or religions other than Judaism. (Pet., p. 18).

B. The Operation of Max Feinberg's Trust

Max's trust instrument directed the trustee to divide the trust property between two further trusts on Max's death and granted Max's widow, Erla Feinberg ("Erla"), the net income and a limited right of withdrawal of principal from both resulting trusts. (App. 2). Importantly, Max also gave Erla a testamentary power of appointment over the principal of both resulting trusts, exercisable in favor of Max's descendants. (*Id.* at 3). Max's trust instrument further provided that, upon Erla's death, the balance of the resulting trusts would be distributed to Max's children and grandchildren, subject to the Religious Preference Clause, each share to be held in a separate trust for the benefit of the descendant during his or her lifetime. (*Id.*)

Max Feinberg died in 1986. (*Id.* at 2). His will named his children, Michael Feinberg (the Respondent)

and Leila Taylor ("Leila"), as co-executors of his estate and provided that the residue of his estate be distributed to his trust. (*Id.*) He was survived by Erla, two children and five grandchildren, including Petitioner. (*Id.*)

Erla did, in fact, exercise her power of appointment by directing that, on her death, the trustee would make a gift of $250,000 from the resulting trusts' principal to each of the children and grandchildren who were not "deemed deceased." (App. 4). Under the terms of the bequest, if any grandchild was deemed deceased at the time of Erla's death, his or her gift would instead be paid to the parents of that grandchild. (*Id.*) These bequests were sufficient, at the time of Erla's death, to completely deplete the assets of the trusts, net estate taxes. (*Id.*)

Contrary to Petitioner's unfounded assertions, nothing in the terms of Max's trust instrument or Erla's appointment required court involvement or approval and both were fully capable of private administration by the relevant trustees in accordance with their terms. (Pet., p. 3).

It is undisputed that only one of Max and Erla's five grandchildren married within the Jewish faith. (App. 4-5). Petitioner concedes she did not marry within the Jewish faith. (Pet., p. 3).

C. The Procedural History

Erla Feinberg died in 2003. (App. 5). In June 2004, Petitioner filed suit against her aunt, asserting, among other things, that Leila had tortiously interfered with Petitioner's expectancy; Petitioner later added her father, Respondent, as an additional defendant. (C0003). Erla's will was admitted to probate in July 2004, and Max's will was admitted in September of that same year.[2] (C0085, 0197). The cases were consolidated in October 2005. (C1021).

In March 2006, Leila filed an "Amended Petition For Construction of the 'Jewish Clause,'" which sought a declaratory judgement as to the clause's enforceability, specifically as applied to Petitioner. (C1834-65). In August 2006, the probate court entered an order holding that the Religious Preference Clause was contrary to public policy. (App. 63-68). Respondent and Leila, individually and as co-executors of Max's estate, filed timely, interlocutory notices of appeal to the Appellate Court of Illinois. In June 2008, the appellate court, in a 2-1 decision, affirmed the trial court. (*Id.* at 40-62).

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[2] Max's will was admitted to probate eighteen years after his death because assets were found in his name that needed to be added to the resulting trusts, not because any party sought or required interpretation or enforcement of the trusts' terms

D. The Illinois Supreme Court's Opinion

The Illinois Supreme Court reversed in a unanimous decision. The court held that Erla's exercise of her power of appointment fundamentally altered the operation of the Religious Preference Clause from both a factual and legal perspective. Had Max survived Erla, his trust would have, upon his death, created funded trusts for those grandchildren who had not married outside the Jewish faith. (App. 3). A grandchild could, arguably, lose his or her rights to a funded trust if he or she subsequently married outside the faith. Max's trust, therefore, could have created a condition subsequent on his grandchildren's inheritances and this condition could, arguably, have influenced their behavior after his death.

Erla's appointment, on the other hand, made outright, one-time gifts – in amounts sufficient to deplete the trust – to those grandchildren who had not married outside the Jewish faith prior to Erla's death. (*Id.* at 31-32). Erla's appointment, therefore, created a condition precedent on the grandchildrens' inheritances; the only relevant factual determination regarding the Clause's application was the grandchildren's marital status at the time of Erla's death. (*Id.*) The Clause, as modified by Erla's appointment, was not, therefore, directed to any future conduct and could not have influenced the grandchildren's behavior after her death. (*Id.*) The use of such conditions precedent is the legal and functional equivalent of simply excluding certain potential beneficiaries by name which, all parties concede, is legally permissible

regardless of the testator's underlying reasons or motivations. (*Id.* at 6, 29). Recognizing this, the Illinois Supreme Court held that, under Illinois common law, testators are free to distribute their estate as they "see fit and to favor grandchildren of whose life choices they approved over other grandchildren who made choices of which they disapproved, so long as they did not convey a vested interest that was subject to divestment by a condition subsequent that tended to unreasonably restrict marriage or encourage divorce." (*Id.* at 38).

The Illinois Supreme Court did address Petitioner's constitutional arguments, holding that "[b]ecause a testator or the settlor of a trust is not a state actor, there are no constitutional dimensions to his choice of beneficiaries. Equal protection does not require that all children be treated equally; . . . and the free exercise clause does not require a grandparent to treat grandchildren who reject his religious beliefs and customs in the same manner as he treats those who conform to his traditions." (*Id.* at 36-37). The Court rejected Petitioner's interpretation of *Shelley v. Kraemer*, 334 U.S. 1 (1948), holding that "[t]his court . . . has been reluctant to base a finding of state action on the mere fact that a state court is the forum for the dispute." (App. 37) (internal quotations and citations omitted). *See also*, note 4 and accompanying text, *infra*.

ARGUMENT

A. There Is No Compelling Reason to Hear Petitioner's Equal Protection Arguments.

Petitioner fails to demonstrate a "compelling reason" this Court should grant review on a writ of certiorari with respect to Petitioner's Fourteenth Amendment arguments. SUP. CT. R. 10. Petitioner fails to establish either (1) a conflict between the Illinois Supreme Court's decision and the decision of any other state court of last resort or federal court of appeals or (2) that the Illinois Supreme Court decided an important question of federal law in the absence of or in conflict with a decision of this Court. SUP. CT. R. 10(b) & (c). The petition should be denied.

Petitioner's underlying argument is easily summarized. Petitioner does not deny that "Max and Erla could have accomplished the goal of benefitting only those grandchildren who married within their religious tradition by individually naming those grandchildren as beneficiaries of the will or the trust. . . ." (App. 6). Petitioner contends, however, that a violation of the Fourteenth Amendment occurred when Max used a religious description to define a class or category of descendants he wished to benefit, rather than mention them by name, and a state court gave legal effect to the document containing that description. (Pet., p. 11). Petitioner seeks to expand this Court's holding in *Shelley v. Kraemer*, 334 U.S. 1 (1948), beyond the context of racially-discriminatory restrictions on property rights to forbid state courts

from giving legal effect to any private document making a distinction on the basis of religion (or, presumably, any suspect class).

1. Petitioner cannot establish a conflict among the relevant courts.

Petitioner fails to establish that her proposed expansion of *Shelley* should be heard by this Court. Firstly, Petitioner makes no effort whatsoever to show that the Illinois Supreme Court's decision either conflicts with the decision of another state court of last resort or of a United States court of appeal or decided an important question of federal law that has not been, but should be, settled by this Court. SUP. CT. R. 10(b)

Petitioner cannot, in fact, make such a showing. The highest courts of Massachusetts, Pennsylvania and Oregon – to Respondent's knowledge, the only relevant courts to consider the question – all held that *Shelley* has no application in the judicial enforcement of a testamentary condition encouraging adherence to or marriage within a particular faith. *See Gordon v. Gordon*, 124 N.E.2d 228, 235 (Mass. 1955) (revoking inheritance upon marriage outside the Jewish faith); *United States Bank of Portland v. Snodgrass*, 275 P.2d 860, 866 (Or. 1954) (revoking inheritance upon marriage within Catholic faith prior to thirty-second birthday); *In re Estate of Laning*, 339 A.2d 520, 525 (Pa. 1975) (conditioning inheritance on membership in Presbyterian Church).

Similarly, in the few instances in which this Court addressed wills or trusts granting property for purposes implicating suspect classifications, namely, the establishment and operation of racially-discriminatory educational or municipal institutions, this Court declined to apply, or even mention, *Shelley* or to rule that court enforcement of the will or trust terms themselves would be unconstitutional and, instead, focused on the fact that state involvement in the resulting institutions would constitute discriminatory state action. *See Pennsylvania v. Board of Dirs. of City Trusts of Philadelphia*, 353 U.S. 230, 230-31 (1957) (will leaving property in trust for establishment of college admitting whites only); *Evans v. Newton*, 382 U.S. 296, 298-302 (1966) (will leaving property in trust for establishment of municipal park admitting whites only). *But cf. Pennsylvania v. Brown*, 392 F.2d 120, 124 (3d Cir. 1968) (stating, in successor to *City Trusts*, that *Shelley* "points to affirmance" of judgment forbidding state college from excluding non-whites) (*dicta*).

Furthermore, this Court's ruling in *Evans v. Abney*, 396 U.S. 435 (1970), the successor to *Newton*, strongly implies that *Shelley* has no application in the judicial interpretation or execution of private wills and trusts. The *Abney* court ruled that, since the relevant municipality could not operate a whites-only park in accordance with the testator's trust, the trust's purpose had failed, the common law reversionary rule would apply and the park property would revert to the testator's estate. *Abney*, 396 U.S. at 444.

The *Abney* court might have been expected to forbid enforcement of the "whites-only" provisions of the trust, much as the *Shelley* court forbid enforcement of the racially-restrictive covenants at issue there. The fact that *Abney* relied on the facially-neutral, common law reversionary rule, instead – in effect, giving force to the testators' discriminatory intent that the park be used by whites only or not at all – strongly suggests that this Court did not intend *Shelley* to mean that judicial involvement in the interpretation and execution of a private will and trust renders that involvement or those private documents discriminatory state action under the Fourteenth Amendment.

Because Petitioner cannot demonstrate a conflict between the decision of the Illinois Supreme Court and that of this Court, any state court of last resort or any federal court of appeals, the petition should be denied.

2. Petitioner cannot demonstrate a conflict between the Illinois Supreme Court's decision and this Court's decision in *Shelley*.

Petitioner's underlying argument is, in any case, meritless. The Illinois Supreme Court did not deprive Petitioner of an existing right, as the state courts did in *Shelley*, and the Illinois courts' declaration of the validity of a private document is not such pervasive action as to make that private document's content the

equivalent of discriminatory state action.[3] The petition should be denied.

Shelley addressed a restrictive covenant recorded against certain residential real estate in St. Louis, Missouri. 334 U.S. at 4-5. That covenant restricted the property's use and occupancy to members of "the Caucasian race" for a period of fifty years. *Id.* The owner of the property, however, sold it to the Shelleys, who were African-American. *Id.* at 5. Third party owners of neighboring properties subject to the covenant sued in Missouri's state courts, seeking an injunction preventing the Shelleys from taking possession of their property and an order divesting their title and revesting title in the prior owner. *Id.* at 6.

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[3] Respondent does not concede that the underlying private conduct would violate the Fourteenth Amendment, even if this Court found an injury and state action. Given the nature of a petition for writ of certiorari, however, and the fact that Petitioner simply assumed, without establishing, an underlying violation, Respondent does not address this point in full. Instead, Respondent reserves his right to fully argue this point in the event the petition is granted and notes that persons who marry outside their religion are not a suspect class and, therefore, the classification at issue would receive "rational basis" review. *United States v. Carolene Prods Co.*, 304 U.S 144, 152 n 4 (1938). The Illinois Supreme Court recognized that Max Feinberg's intent was to "promot[e] through his own family the preservation of the Jewish culture and faith that he both treasured and feared was at risk." (App. 16, 65). This, and the common law preference in favor of giving effect to a testator's intent are, surely, legitimate interests to which the enforcement of Max and Erla's testamentary documents is rationally related. *See In re Estate of Hughlett*, 113 Ill App. 3d 910, 913 (1983) (Illinois policy favoring enforcement of testator's intent).

Although the trial court denied the third parties' claims, the Supreme Court of Missouri reversed and directed the trial court to grant the third parties' requested relief. *Id.* The Shelleys were occupying the property at the time of the Missouri Supreme Court's decision. *Id.*

This Court reversed, holding that, although the Fourteenth Amendment "erects no shield against merely private conduct," the judicial enforcement of the restrictive covenants constituted state action violating the Equal Protection Clause:

> The undisputed facts disclose the petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts for sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without constraint.
>
> These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the

> grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

Id. at 19.

As the foregoing excerpt makes clear, the Court's ruling hinged on two key points. First, the state courts' actions deprived the Shelleys of equal protection, not merely because they enforced a private document containing a race-based distinction, but because this enforcement effectively abridged basic property rights otherwise available to all citizens, namely, the right to purchase and occupy property pursuant to legal and voluntary contracts of sale. As Chief Justice Vinson, the author of this Court's opinion in *Shelley*, later observed in his dissenting opinion in *Barrows v. Jackson*, 346 U.S. 249, 261 (1953):

> [t]he question which we decided was simply whether a state court could decree the ouster of Negroes from property which they had purchased and which they were enjoying. We held that it could not. We held that such judicial action, which operated directly against the Negro petitioners and deprived them of their right to enjoy their property solely because of their race, was state action and constituted a denial of "equal protection."

Second, the state courts' rulings constituted state action under the Fourteenth Amendment not merely because those courts served as forums for a dispute, but because they effectively transformed the coercive power of the state into an invasive tool to enforce discrimination, even between individual, private and willing sellers and buyers who had no personal wish to discriminate. The restrictive covenants, though created through private conduct, were given the effect of state action when state courts came between private actors to frustrate otherwise-lawful commercial transactions on discriminatory grounds.

a. Petitioner was not deprived of a right.

The Illinois Supreme Court's decision has neither of the two key elements present in *Shelley*. First, and perhaps most importantly, the decision in no way operated to deprive Petitioner – or any class of which Petitioner is a member – of a property right generally enjoyed by others. Indeed, it could not because, as the Illinois Supreme Court made abundantly clear, Petitioner never had a vested right in any inheritance whatsoever. Under Illinois law, Petitioner was not an heir at law of Max or Erla and, therefore, had no expectancy of an inheritance. (App. 38). Moreover, neither Max's trust or Erla's appointment created a vested right under Illinois law:

> Max's will and trust created no vested interest in the children or grandchildren because Erla retained a power of appointment until her death. No vested interests were created

> in 1997 by Erla's exercise of her power of appointment. Her actions created a mere expectancy, contingent on her dying without further amending the distribution scheme.

(*Id.* at 32). Unlike the Shelleys, no right was taken from Petitioner because Petitioner had no right to take.

More generally, the Illinois Supreme Court's decision does not effectively deprive or attempt to deprive gentiles or Jewish people who marry gentiles of the right to inherit because it does not enforce a larger, discriminatory pattern designed to deprive those groups of inheritance rights. The specific restrictive covenant considered in *Shelley* operated as part of a larger plan to deprive non-whites of basic property rights and were created against a backdrop of widespread public and private efforts to perpetuate centuries-old, but unlawful, race-based discrimination. There is simply no comparison to the case at bar. There is no history of gentiles and Jewish persons who marry gentiles being denied the equal protection of the nation's probate laws; there is no co-ordinated effort by elderly Jewish grandparents to deprive all gentiles or Jewish persons marrying gentiles of their rights under the Illinois Probate Act and related common law. Even if the Illinois Supreme Court had denied Petitioner a right to inherit – which it did not, as set forth above – that denial would go no further than Petitioner; it certainly would not put the state's seal of approval on a widely-known effort by private individuals to enshrine religious discrimination in

private trust and estate documents generally – as opposed to the state courts' opinions in *Shelley*, which effectively approved a co-ordinated private effort to inject racial discrimination into otherwise voluntary and lawful private real estate sales. No gentile, or Jewish person marrying a gentile, need fear that the probate court will come between that person and a willing testator to enforce a third party's discriminatory views.

b. The Illinois Supreme Court did not invade a transaction between willing parties to enforce a third party's discriminatory scheme.

While the Illinois Supreme Court's decision may have constituted "state action" in and of itself, that decision was not so invasive or dominating in character that it cloaked Max Feinberg's private conduct with the authority of the state, thereby rendering that private conduct "state action" for the purposes of Fourteenth Amendment jurisprudence.

The "state action" requirement is a prudential doctrine, intended to create a sphere of private conduct the state cannot enter, not to expand the scope of the Fourteenth Amendment's protections into the realm of private conduct.

> [C]onstitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities. This fundamental limitation on the scope of constitutional

> guarantees preserves an area of individual freedom by limiting the reach of federal law and avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991).

In order for private conduct to be attributed to the state, the state's involvement must be more than merely incidental. Instead, governmental authority must "dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional guarantees." *Id.* at 620.

Thus, it is uncontroversial to say that "[t]he action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment. . . ." *Shelley,* 334 U.S. at 14. A judicial officer's discriminatory exercise of his or her office is, for instance, plainly forbidden. *See Palmore v. Sidoti*, 466 U.S. 429, 430-34 (1984) (state court awarded child custody to father because mother's new husband African-American).

There is no authority, however, for the proposition advanced by Petitioner, namely, that a state

court raises private conduct to the level of state action merely by enforcing a private document containing a restriction that would unconstitutionally abridge a federal right if, for instance, passed by a legislature.[4] (Pet., pp. 8-11). That is certainly not the holding of *Shelley*. There, the court enforcement of a private document would have, essentially, placed the power of the state at the disposal of a co-ordinated scheme to deprive non-white citizens of their legal rights – to force them into a second-class scheme of property rights, in fact – and would have done so in a particularly invasive and dominating way, namely, by coming between willing buyers and sellers to enforce third party discrimination. *Shelley*, 334 U.S. at 19. In

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[4] At least, this appears to be Petitioner's argument; the petition itself is far from clear In briefing before the Illinois Supreme Court, Petitioner's entire Fourteenth Amendment argument consisted of three sentences, reproduced verbatim here.

> While it was perfectly permissible for Max Feinberg, as an individual during his life, to perpetuate the Jewish faith, the Court, an instrumentality of the State, cannot do the same by enforcing the Jewish Clause without running afoul of the Federal and State Constitutions *See Shelley v Kraemer*, 334 U.S 1, 68 S Ct. 836, 843 (1948) (ruling that "state action in violation of the [Constitution's] provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official . . .") Thus, the court, acting on behalf of the State, may not use its coercive power to perpetuate the Jewish faith where, as here, the State could not enact a statute for the purpose of perpetuating the Jewish faith.

(Pet'r's Ill Sup Ct. Br., p. 36).

the words of the *Edmonson* court, the Shelleys' injuries were "aggravated in a unique way by the incidents of governmental authority" and those injuries would have been replicated again and again in reliance on the acquiescence and co-operation of state courts. *Edmonson*, 500 U.S. at 622.

Both this Court and multiple federal courts of appeal have rejected – whether implicitly or explicitly – Petitioner's interpretation of *Shelley* and have declined to find state action in the mere judicial enforcement of private documents. For instance, in addition to the trusts and estates cases addressed in Part A.1, *supra*, at least one state court of last resort has held that, despite *Shelley*, its enforcement of a private pension contract allegedly classifying parties on the basis of marital status did not constitute discriminatory state action. *Meisner v. Potlatch Corp.*, 954 P.2d 676, 680-81 (Idaho 1998) ("Under [Plaintiff's] theory, any party to a private contract could invoke the Fourteenth Amendment simply by filing an action in state court. We decline to give Shelley the broad reading [Plaintiff] urges upon us."). Similarly, courts have consistently held that, despite *Shelley*, they may enforce private contracts abridging other constitutional rights, such as First Amendment speech rights, even though legislation imposing identical restrictions would be unconstitutional. *See United Egg Producers v. Standard Brands, Inc.*, 44 F.3d 940, 943 (11th Cir. 1995) (settlement agreement restricting advertising content); *Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n*, 29 P.3d 797, 810-11 (Cal.

2001) (restrictive covenant prohibiting tenants from distributing leaflets); *Linn Valley Lakes Prop. Owners Ass'n v. Brockway*, 824 P.2d 948, 951 (Kan. 1992) (restrictive covenant prohibiting landowners from posting signs). The same is true of enforcement of contracts for private arbitration, even where the arbitration procedures at issue would not satisfy the requirements of the Due Process Clause. *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1191-92 (11th Cir. 1995). Nor have courts found unconstitutional state action in the enforcement of a collective bargaining agreement that allegedly limited workers' First Amendment association rights. *White v. Communications Workers, Local 1300*, 370 F.3d 346, 352 (3d Cir. 2004) ("If the fact that the government enforces privately negotiated contracts rendered any act taken pursuant to a contract state action, the state action doctrine would have little meaning."). Respondents are unaware of any court that has adopted Petitioner's reading of *Shelley*.

The policy basis for rejecting Petitioner's reading of *Shelley* is clear enough. If private activity – even private discrimination – were deemed "state action" merely because a state court denied relief to a party challenging that private activity, parties could, essentially, "manufacture" state action by bringing suit in a state court. Indeed, there would be no distinction between state and private action, and no protected sphere of private conduct, since a challenger to that conduct would always prevail – either the state court would grant relief to the challenger or it would deny

relief, thereby engaging in "unconstitutional" state action.

Given the invasive character of the state action in *Shelley* and the vitality of the state action doctrine as articulated in *Edmonson*, the lack of precedential support for Petitioner's reading of *Shelley* is not surprising. Indeed, Petitioner's entire argument depends on a certain, willful ignorance of post-*Shelley* state action jurisprudence. Petitioner cites various scholarly articles, for example, for the overly general proposition that *Shelley* "has proven to be controversial," presumably to create the impression that Petitioner's reading of *Shelley* is actively debated and, in some cases, supported, in the federal courts of appeal and state courts of last resort but, in fact, there is no such debate. As the above-cited authorities demonstrate, Petitioner's reading of *Shelley* has long been rejected. (Pet., pp. 7-8).

Petitioner entirely misplaces her reliance on *Reitman v. Mulkey*, 387 U.S. 369 (1967). Petitioner claims that the case at bar is "the precise kind of situation" presented in *Reitman* because the Illinois Supreme Court "authorized" private discrimination. (Pet., p. 11). There is, in fact, a vast difference between the state action in these two cases. In *Reitman*, the State of California passed a constitutional amendment that would have forbidden any legislative limit on a person's right to refuse to sell or rent their property in their absolute discretion. 387 U.S. at 370. After examining California's actions "in terms of its immediate objective, its ultimate effect and its historical context

and the conditions existing prior to its enactment," this Court held that the State had encouraged and placed its authority at the disposal of a widespread, private effort to discriminate against non-whites by creating an affirmative constitutional right to engage in such discrimination. *Id.* at 373-79 (internal quotations omitted).

California's enaction of a state constitutional amendment for the express purpose of aiding historical, private discrimination cannot reasonably be compared to a single court decision denying a single person an inheritance to which she never had a right in the first place, absent a context of widespread historical discrimination against gentiles and an invidious intent on the part of the state court. Indeed, the Illinois Supreme Court did not even come between willing parties, as in *Shelley*; neither Max nor Erla ever intended for Michele to receive an inheritance, as demonstrated by their use of the Religious Preference Clause.

Petitioner's efforts to ignore the invasive character of the state action in *Shelley* and to "cherry-pick" a single word – "authorize" – from *Reitman* while ignoring all of the other facts and circumstances of those cases should not be countenanced. Because Petitioner cannot show that the Illinois Supreme Court acted in a manner so invasive or dominant that it cloaked private conduct in the authority of the state, Petitioner's argument is meritless and the petition should be denied.

c. The trust and appointment at issue did not require court enforcement.

At times, Petitioner seems to limit her theory of judicial "state action" to judicial interpretation of a private document that, by its nature, "requires" court enforcement or involvement in order to achieve the drafter's underlying purpose. (Pet., pp. 5, 10-11). While this would certainly constitute a stronger version of the state action doctrine than the one originally proposed by Petitioner, it suffers from a complete lack of legal and factual basis.

Firstly, there is simply no legal precedent for Petitioner's argument – much less precedent rejecting it – and, therefore, it is not ready for review by this Court. SUP. CT. R. 10(b). Second, court involvement was not, in fact, required to give effect to Max's trust or Erla's appointment. Max's trust was administered by the trustee without any court supervision whatsoever from the time of Max's death in 1986 until Erla's death in 2003 and the probate of her estate in 2004. (C0085). Petitioner cites no provision of the Illinois Probate Act or the common law requiring a trustee of an irrevocable trust to seek court approval of the trust's administration or, even, to notify a court of the trust's terms and Respondent is aware of no such applicable provision. Nor do Petitioners deny that the trustee was authorized to administer Erla's appointment without court supervision or notification. To Respondent's knowledge, neither the Illinois Probate Act nor the common law required court enforcement or interpretation of Max's trust or Erla's

appointment, as Petitioner, without citation to authority, claims. (Pet., pp. 5, 10-11). Because Petitioner cannot articulate a valid theory of state action applying to this case, the petition should be denied.

d. The "balancing view" is irrelevant.

Petitioner makes an argument under what she calls the "balancing view" of Fourteenth Amendment jurisprudence, in which the formal requirement of state action is jettisoned in favor of a view that balances the injury to the aggrieved party against the merits of the challenged practice. (Pet., pp. 12-14). This argument is entirely irrelevant, as there is no legal precedent for abandoning the state action doctrine; certainly, Petitioner cites none. Given the holding in *Edmonson*, it would appear that the state action doctrine is alive and well. The petition should be denied.

B. There Is No Compelling Reason to Hear Petitioner's Establishment Clause Argument.

1. Petitioner cannot establish a conflict among the relevant courts.

Again, Petitioner cannot demonstrate a conflict between the decision of the Illinois Supreme Court and a decision of another state court of last resort or any federal court of appeals with respect to her Establishment Clause argument. The highest courts of both Pennsylvania and Oregon – to Respondent's

knowledge, the only courts to consider the question – have rejected the argument that declaring the validity of a testamentary religious preference or religious adherence clause constitutes a state action "respecting an establishment of religion" in violation of the First Amendment to the United States Constitution. *See Laning*, 339 A.2d at 525-26 ("we think it clear that the provisions of Pennsylvania law providing for the judicial enforcement of testamentary conditions, whether religious or otherwise, do not constitute a 'law respecting an establishment of religion'"); *Snodgrass*, 275 P.2d at 866 (Establishment Clause "has no effect upon the transactions of individual citizens"). Because Petitioner cannot demonstrate the existence of such a conflict, the petition should be denied.

2. Petitioner cannot demonstrate a conflict between the Illinois Supreme Court's decision and a decision of this Court.

Petitioner's Establishment Clause argument has, in fact, no legal basis whatsoever. Leaving aside the state action problems addressed above, neutral court recognition of a testamentary condition's validity does not violate the Establishment Clause where the conditions have only an incidental effect on the advancement or inhibition of religion. Petitioner contends that court enforcement of the Religious Preference Clause would impermissibly advance religion,

citing *Lynch v. Donnelly*, 465 U.S. 668 (1984). (Pet., pp. 14-15).

A state court's neutral declaration of a private legal document's validity falls far short of the level of state involvement required to implicate the Establishment Clause.

> [S]ubsequent decisions [to *Lynch*] . . . have refined the definition of governmental action that unconstitutionally advances religion. . . . [W]e have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion. . . . [T]he prohibition against governmental endorsement of religion precludes government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*.

County of Allegheny v. ACLU, 492 U.S. 573, 592-93 (1989) (citations omitted) (emphasis in original). "[I]t is no violation for government to enact neutral policies that happen to benefit religion." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) (citations omitted) (state policy of permitting privately-provided displays in state-owned public square irrespective of content). The test Petitioner proposes, "which would attribute to a neutrally behaving government *private* religious expression, has no antecedent in our jurisprudence. . . ." *Id.* (emphasis in original).

Petitioner cannot plausibly argue that court enforcement of the Religious Preference Clause in

accordance with the neutral policy of giving effect to testators' intent would convey the message that Judaism is now the State of Illinois' favored or preferred religion. *See Hughlett*, 113 Ill. App. 3d at 913 (Illinois policy favoring enforcement of testators' intent). Nor can she plausibly claim that neutral enforcement of wills and trusts based on long-standing common law principles does anything other than provide an incidental benefit to private religious expression. *Cf. Doe SD v. Salvation Army*, No. 07-CV-362, 2007 U.S. Dist. LEXIS 69728, at *21-22, 34 (E.D. Mo. Sept. 20, 2007) (enforcing neutral common law of torts against religious organization does not violate Establishment Clause).

3. The Religious Preference Clause presents a question of fact, not of religious doctrine.

Petitioner cites no authority for or against her bald assertion that a court would "necessarily run afoul of the Establishment Clause" if it attempted to answer the factual question of whether Respondent's husband was, in fact, of "the Jewish faith." Accordingly, because Petitioner cannot demonstrate a conflict between the decision of the Illinois Supreme Court and a decision of this Court, a state court of last resort or a federal court of appeals, the petition should be denied. SUP. CT. R. 10(b) & (c).

Nor is the issue relevant or justiciable in this case. Judaism may have many branches, but Petitioner's husband does not belong to any of them. (Pet.,

p. 3; App. 4-5). Even if there were some question, it would be, unremarkably, resolved as would any other question of intent and fact: by determining what the testator meant by the words "Jewish faith" and then determining whether the grandchild's spouse satisfied that definition. *See Larison v. Record*, 117 Ill. 2d 444, 448 (1987) ("Extrinsic evidence of a testator's intent is admissible . . . to resolve an ambiguity in a will."). Massachusetts' highest court, addressing a provision revoking gifts to beneficiaries who married persons not born in the "Jewish faith," approved precisely this course of action, holding that the "language of the testator is not too uncertain to be enforced" and that "the question of fact as to the religious faith of [the beneficiary] should [not] be determined in vacuo any more than should any other question of fact." *Gordon*, 124 N.E.2d at 232. There is no reason to believe that a factual determination of Max's understanding of the "Jewish faith" and a hypothetical grandchild's hypothetical spouse's satisfaction of that definition would be any more difficult in this case than the comparable determinations in *Gordon*. The petition should be denied.

C. There Is No Compelling Reason to Hear Petitioner's "Right to Marry" Argument.

Petitioner cites no authority for or against her claim that the Illinois Supreme Court's decision violated her fundamental right to marry. Accordingly, because Petitioner cannot demonstrate a conflict between the decision of the Illinois Supreme Court and a decision of this Court, a state court of last resort or

a federal court of appeals, the petition should be denied. SUP. CT. R. 10(b) & (c).

Petitioner's claim is, in any event, meritless. In addition to the insurmountable state action problems addressed above, Petitioner forgets that the Clause operated as a condition precedent and that both Max and Erla Feinberg had every right to attempt to influence their grandchildren's behavior during their lifetimes, even through the offering of financial incentives. (App. 16). Petitioner's claim also presupposes that the Religious Preference Clause exerts a persuasive force so powerful that it amounts to duress – in effect, forcing the grandchildren not to marry the spouses of their choice. We know this supposition to be false, however: four out of the five grandchildren did, in fact, marry outside of the Jewish faith, despite the Clause. (App. 4-5). The claim further assumes that a state court's enforcement of the Religious Preference Clause is the functional equivalent of the state's use of force to require or forbid a particular marriage. Again, this assumption is false: if the Clause were enforced (and were the grandchildren not already married), the grandchildren would be free to marry whomever they choose, provided they were willing, as a matter of conscience, to forego their inheritance. Indeed, even that sacrifice would not be necessary were a non-Jewish spouse to convert to Judaism in a timely manner. (Pet., p. 3). There simply is no violation of Petitioner's right to marry and no reason to hear further argument. The petition should be denied.

D. Courts Need Not Enforce "Bigotry."

Petitioner does not even attempt a constitutional or other legal argument in her final, naked effort to inflame this Court's passions. (Pet., pp. 17-19). Instead, she calls her grandparents "bigots" and claims that if they are not stopped, law and reason be damned, future state courts will have "no choice but to enforce all sorts of the worst bigotry imaginable." (*Id.* at 19) (citations and internal quotations omitted).

Petitioner's argument is nothing more than a gross attempt to mislead this Court. There is nothing whatsoever in the record suggesting that Max Feinberg was motivated by religious prejudice, bigotry, or anything other than a sincere intention "to encourage and support Judaism and preservation of Jewish culture in his own family" and, as a contemporary of the Holocaust, his fear of "the potential extinction of the Jewish people." (App. 16, 65; C1879-80). For Petitioner to suggest otherwise is an offense to this process.

Petitioner's attempt to find "bigotry" in the fact that the Religious Preference Clause does not disinherit unmarried grandchildren overlooks the larger purpose of the clause. (Pet., pp. 18-19). The Clause's principal purpose is not to reward particular marriages *per se*, but to "provide a benefit for those descendants of [Max's] children who opt to honor and further [Max's] commitment to the Jewish faith. . . ." (App. 16, 65; C1879-80). One way to further Max's commitment to the Jewish faith was to marry within

that faith since "Jewish religious law prohibits intermarriage and treats it as an abandonment of the faith. . . ." Bleich, *supra*, at 268. Remaining unmarried is another such way, since a grandchild who remains unmarried does not abandon the faith under Jewish law. Marriage outside the Jewish faith, however, unquestionably does result in the abandonment of the faith under traditional Jewish law. *Id.* Thus, the Clause was not intended to "punish" marriage outside the faith, but to benefit those who remain within the faith, either by marriage within the faith or by remaining unmarried.

Finally, it does not logically follow that enforcing, today, a provision intended to preserve and to foster a minority religious tradition will "require" courts to enforce, tomorrow, provisions intended to perpetuate bigoted and discriminatory attitudes towards that same minority. Public policy and constitutional determinations require a more flexible inquiry than this false, "logical" equivalency and future courts, if they so desire, will have no difficulty identifying a plethora of constitutional, statutory and judicial authorities – from hate crime laws to equal employment protections – supporting establishment of a public policy against testamentary conditions motivated by prejudice and hatred.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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